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Juvenile Law

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Juvenile Law: 1995 Survey of Florida Law

Michael J. Dale*

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I. INTRODUCTION

This year marks a respite from the frenetic pace of recent legislative efforts in Florida to respond to the perceived problems in Florida's juvenile justice system.¹ This survey briefly highlights the legislative changes. On

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1. For a discussion of legislative changes from 1989 through 1994, see Michael J. Dale, *Juvenile Law: 1994 Survey of Florida Law*, 19 NOVA L. REV. 139 (1994) [hereinafter *1994 Survey*]; Michael J. Dale, *Juvenile Law: 1993 Leading Cases and Significant Developments in Florida Law*, 18 NOVA L. REV. 541 (1993) [hereinafter *1993 Leading Cases*]; Michael J. Dale, *Juvenile Law: 1992 Survey of Florida Law*, 17 NOVA L. REV. 335 (1992) [hereinafter

the other hand, the appellate courts remained active, continuing a long-standing process of correcting trial court excesses and blatant failures to comply with the provisions of the juvenile code. Finally, the state supreme court heard several cases on narrow issues of juvenile law, as well as one significant case involving privacy and a minor's consensual sexual activity and a second involving the liability of the Department of Health and Rehabilitative Services ("HRS") for negligent allocation of services to dependent and delinquent children.

II. DELINQUENCY

A. Detention Issues

Previous survey articles in this law review have dealt with Florida's changing approach to juvenile detention over the past fifteen years and have studied the large number of recent appellate cases interpreting the detention laws.² It is no different this year.

Chapter 39 of the *Florida Statutes* requires that an intake counselor who receives custody of the child from a law enforcement agency review the law enforcement report or probable cause affidavit to determine whether detention of a child on delinquency charges is required.³ In doing so, the counselor bases his or her decision on whether or not to hold the child in secure or non-secure detention on an assessment of risk that the child will not appear and/or will commit other offenses.⁴ The decision is premised upon a risk assessment instrument ("RAI"), a procedure developed by the Department of Juvenile Justice.⁵ The RAI is based upon statutory detention guidelines including, most significantly, the charge against the child. Even when the charge is not significant enough to securely detain the child, the court still has discretion to securely detain the child if it finds clear and

1992 Survey]; Michael J. Dale, *Juvenile Law: 1991 Survey of Florida Law*, 16 NOVA L. REV. 333 (1991) [hereinafter *1991 Survey*]; Michael J. Dale, *Juvenile Law: 1990 Survey of Florida Law*, 15 NOVA L. REV. 1169 (1990) [hereinafter *1990 Survey*]; Michael J. Dale, *Juvenile Law*, 14 NOVA L. REV. 859 (1990) [hereinafter *Juvenile Law*]; Michael J. Dale, *Juvenile Law*, 13 NOVA L. REV. 1159 (1989); see also THE FLORIDA BAR CONTINUING LEGAL EDUCATION, *FLORIDA JUVENILE LAW AND PRACTICE* (4th ed. 1995).

2. 1994 Survey, *supra* note 1, at 150-51; 1993 Leading Cases, *supra* note 1, at 552-54; 1992 Survey, *supra* note 1, at 348-53.

3. FLA. STAT. § 39.044(1) (Supp. 1994).

4. See *id.* § 39.042(1).

5. See *id.* § 39.042(2)(b).

convincing evidence that the minor is a clear and present danger to himself or the community.⁶

In *T.L.W. v. Soud*,⁷ the First District Court of Appeal was asked to determine whether the trial court had properly applied its discretionary standard to securely detain a child. After examining the facts, the appellate court found that it did.⁸ In addition, the court held that a writ of habeas corpus is a proper remedy for a minor held in secure detention, although statutory language would appear to indicate otherwise.⁹ However, the court also held that rule 8.130 of the *Florida Rules of Juvenile Procedure* provides for trial court reconsideration of the issue through a motion for rehearing.¹⁰ The appellate court expressly held that in the future, a trial court's reconsideration of a claim that secure detention is contrary to law shall be required prior to filing a writ for habeas corpus in the appellate court.¹¹

In *S.A.M. v. Bessette*,¹² a juvenile filed a petition for a writ of habeas corpus, alleging illegal detention in violation of chapter 39. The juvenile was charged with two counts of grand theft and was detained for failure to appear on at least two previous occasions.¹³ The statute provides that a child may be held in secure detention if he or she meets the detention admission criteria.¹⁴ A child may be placed in secure detention even when not provided under the RAI computation system.¹⁵ However, as noted above, the court must state in writing clear and convincing reasons for such placement.¹⁶ In the *S.A.M.* case, the child did not meet the statutory detention criteria because she was not charged with a crime articulated in the statute as warranting detention.¹⁷ The only basis for detention articulated by the court was the allegation that the child was in contempt of court

6. *Id.* § 39.044(2).

7. 645 So. 2d 1101 (Fla. 1st Dist. Ct. App. 1994).

8. *Id.* at 1106.

9. *Id.* at 1104. See also FLA. STAT. § 39.044(5)(a).

10. *T.L.W.*, 645 So. 2d at 1105 n.2.

11. *Id.*

12. 641 So. 2d 948 (Fla. 2d Dist. Ct. App. 1994).

13. *Id.* at 949.

14. See generally FLA. STAT. § 39.044.

15. *Id.*

16. *Id.* § 39.044(2)(f), which states: "If the court orders a placement more restrictive than indicated by the results of the risk assessment instrument, the court shall state, in writing, clear and convincing reasons for such placement." *Id.*

17. *S.A.M.*, 641 So. 2d at 949.

for failure to appear.¹⁸ Since the trial court failed to show grounds to override the statute, the appellate court granted the writ and ordered the discharge of the child.¹⁹

B. Trial Issues

Following the Supreme Court of the United State's 1967 decision in *re Gault*,²⁰ Florida provided each child with a statutory right to counsel.²¹ In *Washington v. State*,²² the Third District Court of Appeal was faced with the question of whether the trial court could hold a detention hearing pursuant to rule 8.305(b) of the *Florida Rules of Juvenile Procedure* in the absence of counsel for the child. In an ill-considered opinion, devoid of statutory authority, the court held that counsel was not necessary.²³ Relying solely upon rule 8.305(b)(1), the court held that, "the rule does not entitle defendant to counsel at this early stage in the juvenile adjudicatory process. A detention hearing is merely an informal, non-adversarial proceeding to inform defendant of the right to counsel in future proceedings and determine whether probable cause exists to further detain defendant."²⁴

The court's decision is incorrect for two reasons. First, it apparently failed to consider the Florida statute governing a child's right to counsel in delinquency proceedings. Section 39.041 of the *Florida Statutes* provides that a child is entitled to representation by legal counsel "at all stages of any proceedings under this part."²⁵ By "part," of course, the legislature meant chapter 39 of the juvenile code. Furthermore, this section provides that the lawyer representing the child shall provide counsel "at any time subsequent to the child's arrest, including *prior* to a detention hearing while in secure

18. *Id.*

19. *Id.*

20. 387 U.S. 1 (1967) (recognizing the child's constitutional right to counsel, including an attorney free of charge if indigent, right to notice, right to an opportunity to be heard, and other protections in a juvenile delinquency case).

21. FLA. STAT. § 39.041 (1993).

22. 642 So. 2d 61 (Fla. 3d Dist. Ct. App. 1994).

23. *Id.* at 63. It is interesting to note that the appellant appealed pro per for post conviction relief pursuant to rule 3.850 of the *Florida Rules of Criminal Procedure* from a conviction as an adult on the charges, although the defendant was sixteen at the time of the arrest. "Pro per" is short for *propria persona*, which means "in one's own proper person." BLACK'S LAW DICTIONARY 792 (6th ed. 1990). It is essentially the same as "pro se," or representation without a lawyer.

24. *Washington*, 642 So. 2d at 63.

25. FLA. STAT. § 39.041.

detention care.”²⁶ The second fallacy in the court’s reasoning is that the detention hearing is, or ought to be, a serious adversary proceeding wherein it is determined whether secure detention, in particular, is appropriate. Detention away from home in a locked setting is a serious issue involving a deprivation of liberty with due process ramifications and ought not be cavalierly disregarded by the courts.²⁷

Chapter 39 contains provisions for legal representation of the child, and interim medical and mental health services to the youngster. It allows the trial court to order psychological evaluations in delinquency cases and to require treatment both for alleged and adjudicated delinquent children.²⁸ However, the development of psychological evaluations on behalf of the juvenile defendant by his or her lawyer in preparing a defense is separate and distinct from the court’s power to order services.

In *H.A.W. v. State*,²⁹ the Public Defender’s Office requested and paid for a psychological evaluation of the child to aid in his defense. Apparently, the evaluation was performed after the child admitted to the charges. The evaluation was available to the defense before the dispositional hearing and thus would have been available for use in arguing for various dispositional alternatives.³⁰ The trial court ordered the defense counsel to release the psychological evaluation to the HRS to aid in the child’s treatment after disposition. An appeal followed. The appellate court held that the disclosure of information received from an expert retained to assist the defendant’s counsel in preparing a defense violated the child’s attorney/client privilege.³¹ According to the appellate court, the fact that the child had been adjudicated and sentenced before the court ordered the release of the evaluation was irrelevant.³² The adjudication did not constitute a waiver of the child’s privilege under *Florida Statutes* sections

26. *Id.* § 39.041(1) (emphasis added).

27. *Cf.* 1992 Survey, *supra* note 1, at 343. For a discussion of the severity of secure detention in Florida, see Michael J. Dale & Carl Sanniti, *Litigation as an Instrument for Change in Juvenile Detention: A Case Study*, 39 CRIME & DELINQ. 49 (1992). For a comparison with other states that recognize a right to counsel during a detention hearing see *Baumer v. State*, 777 S.W.2d 847 (Ark. 1989); *In re Jesse P.*, 5 Cal. Rptr. 2d 321 (Ct. App. 1992); *T.K. v. State*, 190 S.E.2d 588 (Ga. Ct. App. 1972); *People v. Giminez*, 319 N.E.2d 570 (Ill. App. Ct. 1974); *State ex rel. M.C.H. v. Kinder*, 317 S.E.2d 150 (W. Va. 1984).

28. *See* FLA. STAT. § 39.046(1)-(3) (Supp. 1994).

29. 652 So. 2d 948 (Fla. 5th Dist. Ct. App. 1995).

30. *Id.* at 949.

31. *Id.*

32. *Id.*

90.502 and 90.503 which govern the attorney/client privilege in Florida.³³ The court then quashed the order requiring counsel to provide the psychological evaluation to HRS.³⁴

A difficult problem for the juvenile court is how to cope with a delinquent child who has been determined incompetent to proceed with an adjudicatory hearing because of his or her level of mental retardation. In *Department of Health & Rehabilitative Services v. State*,³⁵ HRS appealed from orders in four delinquency cases. In each case, the trial court found the youngster incompetent, then ordered HRS to begin proceedings for involuntary hospitalization and, if the child did not qualify, to place the child in a long-term mental health treatment facility.³⁶ In the interim, the court ordered that the children be held by HRS. The trial court relied upon *Florida Statutes* section 916.13, which governs procedures for court ordered involuntary commitment of adult defendants who are determined to be incompetent to stand trial or be sentenced. However, the appellate court found that the statute did not apply to juvenile delinquency proceedings, basing its opinion upon the language of section 916.13, which speaks of "defendants," "standing trial," "sentencing," and "criminal court."³⁷ The appellate court recognized that rule 8.095 of the *Florida Rules of Juvenile Procedure* is the only procedure that is expressly available for juveniles who are incompetent to proceed in delinquency adjudicatory hearings.³⁸ The appellate court found that the reference in the *Florida Rules of Juvenile Procedure* is to section 394, known as the "Baker Act" proceeding which provides for involuntarily commitment of the severely retarded but does not involve "hospitalization."³⁹

However, the court noted that the juvenile rule had been amended to allow for non-delinquent treatment including hospitalization and its effective date was January 26, 1995.⁴⁰ Thus, while the appellate court ruled that section 916.13 was inapplicable and the trial court lacked the power to order the involuntary commitment of a child alleged to be delinquent, the trial court was directed to proceed under the juvenile rules.⁴¹ Under the new

33. *Id.*

34. *H.A.W.*, 652 So. 2d at 949.

35. 655 So. 2d 227 (Fla. 5th Dist. Ct. App. 1995).

36. *Id.* at 228.

37. *Id.*

38. *Id.*

39. *Id.* at 228-29.

40. *HRS v. State*, 655 So. 2d at 229.

41. *Id.*

rule, the court may now order treatment for a period of up to two years.⁴² Thus, the court may now seek a section 393 and section 394 commitment.⁴³

C. *Adjudicatory Issues*

In an important decision affecting juveniles, the Supreme Court of Florida in *B.B. v. State*⁴⁴ was asked to answer the question of whether Florida's constitutional provision governing privacy makes *Florida Statutes* section 794.05, governing unlawful carnal intercourse, unconstitutional as it pertains to a minor's consensual sexual activity. The appellant was charged under *Florida Statutes* section 794.05 and filed a motion to declare the statute unconstitutional as violative of his right to privacy and to dismiss the petition. The petition was granted and the State appealed. Specifically, the court was asked to determine whether a minor who engages in unlawful carnal intercourse with an unmarried minor can be adjudicated to have committed a felony of the second degree in light of the minor's right to privacy guaranteed by the *Florida Constitution*.⁴⁵ In an opinion by Justice Wells, the court relied upon *In re T.W.*, in which the Supreme Court of Florida had recognized that the right of privacy in article I, section 23 of the *Florida Constitution* extends to minors.⁴⁶ The *B.B.* court held that the minor had a legitimate expectation of privacy in carnal intercourse because it is by express definition an intimate act.⁴⁷ In order to hold the child criminally accountable, the court said that a compelling state interest must be found to overcome the right to privacy.⁴⁸ It was conceded by the court that Florida does have an obligation and a compelling interest in protecting children from sexual activity before they have sufficiently matured to make appropriate decisions.⁴⁹ However, in a minor-minor situation, unlike an adult-minor situation, the prevention of exploitation rationale is non-existent.⁵⁰ In the minor-minor situation, the statute, according to the court, is used as a weapon to adjudicate a minor delinquent rather than as a shield

42. *Id.*

43. *Id.*

44. 659 So. 2d 256 (Fla. 1995).

45. *Id.* at 257.

46. *Id.* (citing *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989)).

47. *Id.* at 259.

48. *Id.*

49. *B.B.*, 659 So. 2d at 259.

50. *Id.*

to protect the minor.⁵¹ The court therefore held the statute unconstitutional as applied to the minor.⁵²

In *B.H. v. State*,⁵³ the Supreme Court of Florida recently resolved a conflict between the district courts of appeal over the constitutionality of the juvenile escape statute.⁵⁴ The First and Fifth District Courts of Appeal were at odds over the constitutionality of section 39.061 of the juvenile code, which is the statute governing escapes from juvenile facilities. In fact, the more significant issue the court resolved dealt with the role that the administrative agency, here HRS, could take in defining the elements of a crime.⁵⁵ After the court analyzed both federal and state precedent, it found that the power to create crimes and punishments rests solely in the legislative branch.⁵⁶ Further, the court held that administrative agencies do not have the authority to create a criminal statute or its equivalent, nor can they prescribe the penalty.⁵⁷ The court concluded that the statute violated two constitutional doctrines: the non-delegation doctrine, in which the legislature authorized the administrative agency to decide exactly for which categories of juvenile incarceration escape would be a felony and the vagueness doctrine, resulting from the failure of the legislature to articulate in the statute the activity for which escape would constitute a felony.⁵⁸ The latter failure was a violation of the due process rights of the child. In other words, the statute failed to give notice of the prohibited act.⁵⁹ Despite having concluded that the statute was unconstitutional, under the doctrine of statutory revival, the court applied the predecessor statute, holding it constitutional, and upheld the adjudication of escape.⁶⁰ In his dissenting opinion, Justice Kogan argued that once the current statute was rendered unconstitutional, the appellate court lacked the authority to review the prior statute because doing so violated the child's due process rights due to the lack of notice of prohibited conduct and the denial of the child's opportunity to defend against the revised statute.⁶¹

51. *Id.* at 260.

52. *Id.*

53. 645 So. 2d 987 (Fla. 1994), *cert. denied*, 115 S. Ct. 2559 (1995).

54. *Id.* at 995.

55. *Id.* at 990.

56. *Id.* at 992.

57. *Id.* at 992-93.

58. *B.H.*, 645 So. 2d at 994.

59. *Id.* at 994.

60. *Id.* at 995-96.

61. *Id.* at 997.

D. *Dispositional Issues*

As noted in prior survey articles, chapter 39 contains a variety of dispositional choices available to the juvenile court including restitution, community control, and commitment to various facilities operated or supervised by the Department of Juvenile Justice.⁶² Proper use of Florida's restitution statute arises regularly in appellate case law.⁶³ Defining the limitations on the use of an order for restitution was recently before the Supreme Court of Florida in *C.W. v. State*.⁶⁴ The specific issue was whether the grant of authority under the Florida juvenile code provision governing restitution includes damage for pain and suffering. The appellants pled no contest to charges of aggravated battery. The trial court placed the appellants on community control and ordered them and their parents to pay restitution, including services for a psychologist, dental surgeon, and hospital, and then ordered payment for the victim's pain and suffering.⁶⁵ The court held that the language of the statute⁶⁶ which referred to any damage caused by the child's offense, by its plain language, should include pain and suffering because such damages have long been recognized as compensable damages in Florida.⁶⁷

However, ordering restitution is not without limitation under the Florida statute. Thus, in *K.M.G. v. State*,⁶⁸ a juvenile appealed a trial order imposing \$1500 in restitution to compensate a victim for damage to his car. The appellant was not charged with the theft of the vehicle, but merely for trespass in a conveyance.⁶⁹ In other words, the appellant was simply riding in the vehicle before the police attempted to stop the car. The appellant and the driver both jumped out of the car at different points in time, and the damage to the vehicle was caused by the resulting crash. After examining the record, the court concluded that there was no evidence that the appellant damaged the interior of the vehicle, that she encouraged the driver to

62. See FLA. STAT. § 39.054; 1994 Survey, *supra* note 1, at 153-56; 1993 Leading Cases, *supra* note 1, at 555-58; 1992 Survey, *supra* note 1, at 358-61. Supervision of delinquency services was transferred from HRS to the Department of Juvenile Justice on October 1, 1994. See FLA. STAT. § 39.021.

63. See 1994 Survey, *supra* note 1, at 154-53; 1993 Leading Cases, *supra* note 1, at 556-57; 1992 Survey, *supra* note 1, at 358-59.

64. 655 So. 2d 87 (Fla. 1995).

65. *Id.* at 88.

66. See FLA. STAT. § 39.054(1)(f) (1993).

67. *C.W.*, 655 So. 2d at 89.

68. 652 So. 2d 481 (Fla. 2d Dist. Ct. App. 1995).

69. *Id.* at 482.

abandon the vehicle, that she was part of a joint venture under tort law, or that there was a conspiracy, so as to hold the appellant vicariously liable.⁷⁰ The appellate court reversed the restitution award because the record did not establish that the appellant was anything other than a passenger.⁷¹

In *J.B. v. State*,⁷² the issue was whether it was error to order restitution for lost wages attributable to the victims' attendance as witnesses at the restitution hearing in a delinquency case. The First District Court of Appeal held that it was not.⁷³ The court concluded that strict construction must be given to the juvenile restitution statute.⁷⁴ There is no reference to lost wages in the statute. Furthermore, the wages were not causally related to the commission of the crime, but resulted from the witnesses' attendance at the hearing. The court therefore reversed.⁷⁵

Finally, in a technical holding, the Second District Court of Appeal, in *C.B. v. State*,⁷⁶ reversed a restitution order where the trial court neither ordered restitution nor reserved jurisdiction to do so at the time of the dispositional order. After the child pled guilty to the commission of a battery, the trial court withheld adjudication and ordered the child to enter and complete juvenile arbitration. The court did not order restitution or reserve jurisdiction to do so. Four months later, the court held the restitution hearing and assessed \$127.47 in restitution.⁷⁷ On appeal, the court held that once the trial court entered its order at the jurisdictional stage, it lacked jurisdiction to enter an order of restitution.⁷⁸

One dispositional alternative which is not available to the juvenile court is to order deportation. Incredibly, one trial court in Collier County tried to do so. In *I.H. v. State*,⁷⁹ the Second District Court of Appeal quickly reversed the finding that while the trial court was permitted to recommend deportation to the federal authorities, it did not have authority to order the deportation.⁸⁰

A recurring problem with juvenile dispositional rulings is the trial courts' disregard of the requirement to provide specific written findings for

70. *Id.*

71. *Id.*

72. 646 So. 2d 808 (Fla. 1st Dist. Ct. App. 1994).

73. *Id.* at 809.

74. *Id.*

75. *Id.*

76. 647 So. 2d 964 (Fla. 2d Dist. Ct. App. 1994).

77. *Id.* at 964.

78. *Id.* at 965.

79. 656 So. 2d 622 (Fla. 2d Dist. Ct. App. 1995).

80. *Id.* at 622.

the imposition of an adult sentence, rather than a juvenile sentence as provided by *Florida Statutes* section 39.059(7)(d).⁸¹ The leading case in this area is *Troutman v. State*.⁸² In *Troutman*, a juvenile pled nolo contendere to charges of false imprisonment and grand theft. The trial court found the sanction recommended in the predisposition report inadequate, and decided to treat the juvenile as an adult.⁸³ The court filed a conclusory written order explaining the rationale for the child's sentence of three years probation, three days after the sentencing occurred.⁸⁴ The Supreme Court of Florida reversed and held that the imposition of adult sanctions must be considered by analyzing the specific circumstances in the case with the statutory criteria before determination of the disposition.⁸⁵ Furthermore, the court was required to provide an individualized evaluation of how the juvenile fits within the enumerated statutory criteria contemporaneously with the sentencing.⁸⁶ Despite the clear statutory provision and the *Troutman* decision, appellate courts continue to remand cases to the trial courts to rectify their failure to provide the required written findings when sentencing juveniles as adults.⁸⁷ This subject also has been regularly reviewed in prior surveys.⁸⁸

The problem continued this past year for cases still in the "pipeline," as noted by the Fourth District Court of Appeal in *Shaw v. State*.⁸⁹ However, by statute which became effective on October 1, 1994, the legislature gave in, apparently recognizing either the unwillingness or inability of the trial courts to carry out the law, and relieved the courts of the burden of making written findings.⁹⁰ The new section 39.059(7)(d) provides that a decision to impose adult sanctions must be in writing, but is

81. FLA. STAT. § 39.059(7)(d) (Supp. 1994).

82. 630 So. 2d 528 (Fla. 1993).

83. *Id.* at 530.

84. *Id.*

85. *Id.* at 531.

86. *Id.* at 532.

87. *See, e.g.,* Jones v. State, 657 So. 2d 23 (Fla. 4th Dist. Ct. App. 1995); Pearson v. State, 657 So. 2d 21 (Fla. 2d Dist. Ct. App. 1995); Walker v. State, 656 So. 2d 950 (Fla. 5th Dist. Ct. App. 1995); Knight v. State, 656 So. 2d 593 (Fla. 2d Dist. Ct. App. 1995); Philmore v. State, 656 So. 2d 270 (Fla. 4th Dist. Ct. App. 1995); Gammage v. State, 655 So. 2d 183 (Fla. 4th Dist. Ct. App. 1995); Wood v. State, 655 So. 2d 1155 (Fla. 5th Dist. Ct. App. 1995); Crain v. State, 653 So. 2d 442 (Fla. 2d Dist. Ct. App. 1995); Satalino v. State, 652 So. 2d 1231 (Fla. 2d Dist. Ct. App. 1995); Sales v. State, 652 So. 513 (Fla. 4th Dist. Ct. App. 1995).

88. *See 1994 Survey, supra* note 1, at 155-56.

89. 645 So. 2d 68 (Fla. 4th Dist. Ct. App. 1994).

90. *See* FLA. STAT. § 39.059(7)(d).

presumed appropriate.⁹¹ The court is not required to state specific findings or enumerate the criteria as a basis for its decision to impose adult sanctions on a juvenile.⁹² The legislature's decision is unfortunate because it makes the appellate court's obligation to determine whether the child's transfer was appropriate more difficult. Now, the appellate court must look at the record on appeal to determine the trial court's rationale. Were the trial court simply to render a written opinion articulating its grounds, summary appellate affirmance would be easier. Furthermore, the legislature's capitulation is harmful to children because it may make the process of transfer to adult court easier in cases where there may be counter-vailing considerations which are now more difficult and time-consuming for defense counsel to present on appeal. Finally, and most discouraging, the change in the law demonstrates that the legislature recognized the seeming incapacity of the trial courts to do what judges are usually thought competent to do — make thoughtful written findings.

Like restitution, the proper use of community control is a recurring issue of appellate review in Florida.⁹³ Community control is Florida's term for probation, and the trial court has great discretion in the choice of devices available to correct juvenile behavior.⁹⁴ In *re D.S.*,⁹⁵ the Fourth District Court of Appeal upheld an order requiring the child not to associate with gang members as a condition of community control. However, the court specified that any violation of probation must be supported by a showing that the child knew that the individuals with whom he was associated were gang members.⁹⁶ In *B.B. v. State*,⁹⁷ the same appellate court was faced with the question of whether the requirement that a child obtain a General

91. *Id.*

92. *Id.* § 39.059(7)(d) states: "Any decision to impose adult sanctions must be in writing, but is presumed appropriate, and the court is not required to set forth specific findings or enumerate the criteria in this subsection as any basis for its decision to impose adult sanctions." *Id.*

93. See 1994 Survey, *supra* note 1, at 157-58; 1993 Leading Cases, *supra* note 1, at 55-56; 1992 Survey, *supra* note 1, at 358-59; 1991 Survey, *supra* note 1, at 349-52; see also *M.B. v. State*, 655 So. 2d 1301 (Fla. 2d Dist. Ct. App. 1995) (holding that a sentence to community control for an indefinite period must be reversed because it exceeds the maximum sentence that can be imposed for the charge — a first degree misdemeanor).

94. See *In re S.C.*, 645 So. 2d 138 (Fla. 4th Dist. Ct. App. 1994). The trial court placed conditions that the child must obtain a psychological evaluation, have a set curfew, attend school every day, and perform fifty hours of community service, which could be worked off by attending counseling. *Id.*

95. 652 So. 2d 892 (Fla. 4th Dist. Ct. App. 1995).

96. *Id.* at 892-93.

97. 647 So. 2d 268 (Fla. 4th Dist. Ct. App. 1994).

Equivalency Diploma ("G.E.D.") within one year, as a provision of community control, together with fifty hours of community service, an apology to the victim, and payment of \$50 to the Florida Crime Compensation Fund, was unreasonable because it was unrelated to rehabilitation and further, because the child could not comply within the time allowed.⁹⁸ The court held that the legislature recognized the correlation between delinquency and lack of education and gave the trial court the power to require enrollment in school or other educational programs as a rehabilitative component of community control.⁹⁹

Another element of the dispositional stage of a delinquency case in Florida involves payment of court costs. In *J.L. v. State*,¹⁰⁰ the child appealed from a finding of delinquency and an order to pay restitution and court costs. Relying on a 1994 district court of appeal opinion, in *J.A. v. State*,¹⁰¹ the Second District Court of Appeal held that court costs may not be assessed because the child's adjudication was withheld.¹⁰²

As part of its 1994 legislative effort to become tougher on juveniles, the Florida Legislature changed its juvenile code in the dispositional area to include the use of detention as a dispositional alternative in limited cases. As a punishment alternative, a minor may serve a five-day mandatory period of detention in a secure detention facility and perform 100 hours of community service for a first offense that involves the use or possession of a firearm.¹⁰³ In *State v. R.F.*,¹⁰⁴ an appeal involving a particularly narrow question, the Third District Court of Appeal held that the term "day" refers to a twenty-four hour period of time and not an "eight" hour work day as interpreted by the trial court when it rendered the dispositional order.¹⁰⁵ The appellate court did note, however, that the trial court had discretion to decide how the mandatory term was to be served.¹⁰⁶ The court explained that where the youngster is in school or working, the trial court may require the term be served on weekends.¹⁰⁷

Under Florida law, a juvenile charged as a delinquent may not be sentenced as an adult. Florida law provides that after a child has been

98. *Id.* at 269.

99. *Id.* at 270 (citing FLA. STAT. § 39.053(2) (1993)).

100. 650 So. 2d 219 (Fla. 3d Dist. Ct. App. 1995).

101. 633 So. 2d 108 (Fla. 2d Dist. Ct. App. 1994).

102. *J.L.*, 650 So. 2d at 220.

103. See FLA. STAT. § 790.22(9)(a).

104. 648 So. 2d 293 (Fla. 3d Dist. Ct. App. 1995).

105. *Id.* at 294.

106. *Id.*

107. *Id.*

transferred by demand of the child, a voluntary or involuntary waiver hearing, based on a criminal information, or indictment, and has been convicted for the offense underlying the transfer, the child must be handled in every respect as if he or she were an adult "for any subsequent violation of state law" unless, as discussed above, the court imposes juvenile sanctions. In *T.L.P. v. State*,¹⁰⁸ a juvenile admitted to the charges of battery, criminal mischief, and violation of community control, and was adjudicated delinquent. Upon discovering that the juvenile was previously sentenced to four years in prison on an unrelated offense for which he was tried as an adult, the trial court sentenced the child to one year in county jail for each offense.¹⁰⁹ The appellate court held that since the juvenile offenses were committed before the child was convicted of the offense for which he was tried as an adult, the juvenile offenses were not subsequent violations under Florida law.¹¹⁰ In order for a child to be subjected to adult penalties, the youngster must be charged as an adult by information or pursuant to a waiver hearing.¹¹¹ If the child has been adjudicated delinquent, the dispositional alternatives do not include incarceration in an adult facility.¹¹²

The Second District Court of Appeal addressed virtually the same issue in an *en banc* review in *Kazakoff v. State*.¹¹³ In *Kazakoff*, all parties involved in the sentencing believed that the juvenile's prior treatment as an adult obviated the need to comply with the provisions of chapter 39 governing adult sentencing. In this case, as in *T.L.P.*, the offense for which the child was charged as a juvenile occurred before the commission of the offenses for which he was charged as an adult.¹¹⁴ Thus, the offenses at issue in *Kazakoff* did not constitute subsequent violations of the law subjecting the child to adult sentencing.¹¹⁵ A second issue before the court in *Kazakoff* was the proper application of Florida's transfer for adult prosecution statute.¹¹⁶ The child claimed that the transfer order failed to contain any findings of fact with regard to two of the mandatory statutory

108. 657 So. 2d 49 (Fla. 2d Dist. Ct. App. 1995).

109. *Id.* at 49.

110. *Id.* at 50.

111. *Id.* at 49 (citing FLA. STAT. § 39.022(5)(d) (1993)).

112. *Id.*

113. 642 So. 2d 596 (Fla. 2d Dist. Ct. App. 1994); *see also* *Thomas v. State*, 657 So. 2d 51 (Fla. 2d Dist. Ct. App. 1995) (following *Kazakoff*).

114. *Kazakoff*, 642 So. 2d at 598.

115. *Id.* at 597.

116. *Id.*

transfer criteria found in section 39.052(2)(c) and 39.052(2)(e).¹¹⁷ The district court of appeal recognized that there was a prior conflict in the appellate case law surrounding the effect of the trial court's failure to make the required statutory findings in the waiver order.¹¹⁸ The appellate court chose to side with those courts that do not treat the deficiency as invalidating the juvenile's subsequent conviction as an adult, but rather require reversal and remand for the more limited purpose of entry of a proper order while leaving the conviction intact.¹¹⁹

E. Appellate Issues

Questions of what constitutes an appealable order in delinquency cases have come before the Florida courts on a number of occasions.¹²⁰ In *State v. Del Rey*,¹²¹ the State filed a consolidated petition for writ of certiorari and appealed, seeking review of a non-final order of the juvenile court. The trial court waived jurisdiction over the child to adult criminal court, but first reduced three filed charges and precluded the state from filing an information charging the child as an adult for an offense other than those on which the court waived jurisdiction.¹²² The appellate court dismissed the appeal for lack of jurisdiction finding there was no supreme court rule of procedure which authorizes the state to appeal from a non-final order in a juvenile delinquency case.¹²³ The court concluded that the *Florida Constitution* allows interlocutory appeals only to the extent provided by the Supreme Court of Florida rules.¹²⁴ Case law indicates that the *Florida Rules of Appellate Procedure* which allow non-final orders to be appealed do not apply in delinquency cases.¹²⁵ The court dismissed the petition for a writ of certiorari and held that certiorari lies only where the order to be reviewed may cause significant injury in subsequent proceedings in which the remedy by appeal will be inadequate.¹²⁶ The court concluded that the State had

117. *Id.* at 598.

118. *Id.* at 599.

119. *Kazakoff*, 642 So. 2d at 599-600.

120. *See 1992 Survey*, *supra* note 1, at 554-55; *1993 Leading Cases*, *supra* note 1, at 364-65.

121. 643 So. 2d 1146 (Fla. 3d Dist. Ct. App. 1994).

122. *Id.* at 1147.

123. *Id.*

124. *Id.*

125. *Id.* (citing *State v. M.G.*, 550 So. 2d 1122 (Fla. 3d Dist. Ct. App.), *review denied*, 551 So. 2d 462 (Fla. 1989)).

126. *Del Rey*, 643 So. 2d at 1148.

since charged the youngster in an information which was the subject of subsequent litigation.¹²⁷ The circuit court had not yet ruled on a motion by the child challenging the information.¹²⁸ If the court were to allow the information, the matter would be moot. If the motion were denied, it would be immediately appealable because, even though it is a final order, it is one dismissing the count of an information.¹²⁹ For these reasons the appeal and the certiorari petition were dismissed.¹³⁰

F. Legislation

As noted, the Florida Legislature did not concentrate its efforts in the area of juvenile law this year. However, in an attempt to address the growing concern about juvenile sexual offenders, the legislature established a juvenile sexual offender statute.¹³¹ After the adjudicatory hearing stage, the court may determine whether placement in a juvenile detention facility is in the best interest of the juvenile sexual offender and the public.¹³² The court may require an examination of the juvenile by a psychologist, therapist, or psychiatrist, and have that person submit a report with a proposed plan of treatment for the child.¹³³ Accordingly, juvenile sexual offenders may, at the court's discretion, be ordered to community-based treatment as opposed to proceeding with a standard disposition hearing.¹³⁴

Once a juvenile is adjudicated a sexual offender, the court may, subject to funding, commit the juvenile to the Department of Juvenile Justice for placement in a sexual offender facility or program.¹³⁵ At this point, the juvenile sexual offender is committed for an indefinite period of time until

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. For a definition of juvenile sexual offender, see ch. 95-267, § 43, 1995 Fla. Sess. Law Serv. 1833, 1866 (West) (to be codified at FLA. STAT. § 39.01(76)); *see also, id.* § 49, 1995 Fla. Sess. Law Serv. at 1871 (to be codified at FLA. STAT. § 415.50165(7)).

132. *Id.* § 45, 1995 Fla. Sess. Law Serv. at 1868 (to be codified at FLA. STAT. § 39.052(6)).

133. *Id.*

134. *See id.* § 45, 1995 Fla. Sess. Law Serv. at 1868-69 (to be codified at FLA. STAT. § 39.052(6)).

135. Ch. 95-267, § 46, 1995 Fla. Sess. Law Serv. at 1869-70 (to be codified at FLA. STAT. § 39.054(1)(j)). *See generally id.* §§ 52-53, 1995 Fla. Sess. Law Serv. at 1874 (to be codified at FLA. STAT. § 415.504) (adding duties of the Task Force on Juvenile Sexual Offenders and the Victims of Juvenile Sexual Abuse and Crimes, and establishing criteria for mental health counselors).

the treatment program is completed, but treatment may not exceed the length of time an adult would serve for the same offense.¹³⁶ Also subject to appropriation, the treatment program must provide educational and psychological services to the juvenile, extending to aftercare counseling and monitoring upon release.¹³⁷ Once a juvenile sexual offender is placed in detention, the detention staff must provide adequate supervision to the other children in the facility, as well as notify school personnel and law enforcement agencies of the sexual offender's release from detention.¹³⁸

The legislation also authorized the Department of Juvenile Justice to create secure juvenile assignment centers for committed youths who are, at a minimum, a moderate risk level.¹³⁹ The centers will house youths after the dispositional hearing pending placement in a residential commitment program.¹⁴⁰ At the centers the children will receive medical, academic, mental health, psychological, behavioral, sociological, substance abuse, and vocational testing.¹⁴¹ The centers will determine the children's treatment needs and develop necessary treatment plans.¹⁴² While staying at the center, the child shall be entitled to numerous short-term services, including educational, vocational, physical and mental health, substance abuse education, anger and impulse management training, and conflict resolution training.¹⁴³ The centers' staff will place the child in a commitment program based on the court ordered restrictiveness level, the evaluation by the centers' staff, and the geographic location of the child's family so that the family can participate in the rehabilitation.¹⁴⁴

136. *Id.* §§ 52-53, 1995 Fla. Sess. Law Serv. at 1874 (to be codified at FLA. STAT. § 415.504).

137. *See id.* § 48, 1995 Fla. Sess. Law Serv. at 1870 (to be codified at FLA. STAT. § 39.0571).

138. *Id.* § 44, 1995 Fla. Sess. Law Serv. at 1868 (to be codified at FLA. STAT. § 39.044(11)(a)-(b)).

139. Ch. 95-267, § 41, 1995 Fla. Sess. Law Serv. at 1866 (to be codified at FLA. STAT. § 39.0551).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. Ch. 95-267, § 41, 1995 Fla. Sess. Law Serv. at 1866 (to be codified at FLA. STAT. § 39.0551).

III. DEPENDENCY AND TERMINATION OF PARENTAL RIGHTS

A. *Adjudicatory Issues*

Dependency proceedings are often used as tactical devices in what are essentially divorce and custody disputes.¹⁴⁵ *Clock v. Clock*¹⁴⁶ is such a case. A stepmother filed a petition for dependency in an effort to stop the planned relocation of her stepson with the child's natural father from Florida to Colorado. The petition was brought because the child wanted to stay in Florida with the stepmother from whom the father had been divorced after nine years of marriage. The child remained with the stepmother after the divorce until the end of the school year when the father planned to move back to Colorado with the child. The petition alleged, among other things, that the father abandoned the child in Monroe County, Florida and that the child was in risk of neglect, abuse, or abandonment if he returned to Colorado with his father.¹⁴⁷ Finally, the petition alleged that the child did not wish to relocate to Colorado.¹⁴⁸ After hearing testimony, the trial court granted the petition for dependency despite an earlier finding that no abuse, neglect, or abandonment by the natural parents occurred.¹⁴⁹ Ultimately, the trial court returned the child to the custody of his father, but enjoined the father from relocating the child outside of Monroe County, except for summer vacations.¹⁵⁰ The natural parents (the mother residing in Colorado) appealed on the ground that the record did not support a finding of dependency. The appellate court held that the legislature never intended the dependency statute to subject an otherwise fit custodial parent to a charge simply because the parent sought to relocate the child against the child's wishes.¹⁵¹ Thus, the court held that merely "relocating or separating a child from familiar surroundings by an otherwise fit and proper custodial parent against the child's wishes" is not abuse under the dependency provisions of Florida's juvenile code.¹⁵²

Under Florida law, when a court makes a dependency finding it must prepare written findings of fact to support the order.¹⁵³ If a court fails to

145. See 1992 Survey, *supra* note 1, at 369.

146. 649 So. 2d 312 (Fla. 3d Dist. Ct. App. 1995).

147. *Id.* at 313.

148. *Id.*

149. *Id.* at 313-14.

150. *Id.* at 314.

151. *Clock*, 649 So. 2d at 314-15.

152. *Id.* at 315 (citing FLA. STAT. § 39.01(2), (10)(a) (1993)).

153. See FLA. STAT. § 39.409 (1993); FLA. R. JUV. P. 8.330(g).

do so, the case must be remanded for written findings of fact, as the court held in *Ash v. Department of Health & Rehabilitative Services*.¹⁵⁴ Further, as noted by the *Ash* court, written findings of fact are not rendered valid by the filing of a notice of appeal if they are written after jurisdiction has been lost.¹⁵⁵

B. *Child Abuse Registry Reporting Issues*

Florida's child abuse and neglect reporting statute contains provisions for a central abuse registry and tracking system and due process controls to protect alleged perpetrators.¹⁵⁶ Child abuse reporting systems, including Florida's system, have generated substantial litigation. Cases involving implementation of the reporting system continue to regularly come before Florida's appellate courts.¹⁵⁷ In addition, a number of civil rights cases have been brought throughout the country challenging reporting systems.¹⁵⁸

In *S.G. v. Department of Health & Rehabilitative Services*,¹⁵⁹ an appellant sought to have her name expunged from Florida's central child abuse registry and tracking system, causing a statutorily mandated administrative review process to ensue. At an administrative hearing, HRS introduced into evidence a dependency order entered by the circuit court in a parallel proceeding, but failed to argue collateral estoppel or res judicata. The hearing officer found that HRS did not satisfy its statutory burden of proof and recommended expunction. HRS rejected the officer's findings and the appeal followed.¹⁶⁰ The appellate court found, *inter alia*, that the agency incorrectly relied on a non-final dependency order which was the subject of a pending appeal.¹⁶¹ In fact, two weeks after the agency's entry of its final order, the Third District Court of Appeal reversed and remanded the dependency order.¹⁶² Incredibly, HRS declined to file a brief in *S.G.*, with the result of "leaving [the court] without any insight into the agency's

154. 649 So. 2d 305, 306 (Fla. 5th Dist. Ct. App. 1995).

155. *Id.*

156. See FLA. STAT. § 415.504(4) (Supp. 1994).

157. For a discussion of cases decided in earlier years, see *1993 Leading Cases*, *supra* note 1, at 551-52; *1991 Survey*, *supra* note 1, at 366-68.

158. See, e.g., *Doe v. Louisiana*, 2 F.3d 1412 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1189 (1994); *Watterson v. Page*, 987 F.2d 1 (1st Cir. 1993).

159. 647 So. 2d 243 (Fla. 1st Dist. Ct. App. 1994).

160. *Id.* at 243.

161. *Id.* at 243-44.

162. *Id.* at 244.

present legal position.”¹⁶³ The appellate court reversed and directed HRS to “enter an order consonant with the conclusions of law reached by the hearing officer.”¹⁶⁴

The constitutionality of the definitional language of the child abuse reporting statute came before the Supreme Court of Florida this past year in *Department of Health & Rehabilitative Services v. A.S.*¹⁶⁵ A single father sought to have his name removed from the HRS central abuse registry having been cited for neglect for leaving his six-year old son home alone for at least six hours. The father, a fish and wildlife officer, elected to take part in a stakeout to apprehend a suspect despite having no arrangements for child care. A report was made to HRS and the father was cited. The father challenged the statutory provision which provides that harm to a child’s health or welfare can occur based upon the failure to provide “the child with supervision or guardianship by specific acts or omissions of a serious nature requiring the intervention of the department or the court.”¹⁶⁶

The supreme court found that the legislature could not define with complete specificity all acts or omissions which are serious enough to fall within the act.¹⁶⁷ According to the court, whether a particular act is covered must be determined on a case-by-case basis.¹⁶⁸ However, the court concluded that the definition provides sufficient standards to be followed by HRS in carrying out its responsibility.¹⁶⁹ Finally, the court held that the standards to be followed relate to the governmental purpose if the goal is the prevention of harm to neglected children.¹⁷⁰ Although the court upheld the statute as constitutional, it concluded that it was inapplicable to the case at hand because the conduct of the father did not rise to the level where he should be classified as a perpetrator of child neglect.¹⁷¹

C. Termination of Parental Rights Issues

Florida’s juvenile code contains four distinct grounds for termination of parental rights:

163. *Id.*

164. *S.G.*, 647 So. 2d at 244.

165. 648 So. 2d 128 (Fla. 1995).

166. *Id.* at 129 (quoting FLA. STAT. § 415.503(9)(e) (Supp. 1990), *amended by* FLA. STAT. § 415.503(10)(e) (Supp. 1994)).

167. *Id.* at 131.

168. *Id.*

169. *Id.*

170. *A.S.*, 648 So. 2d at 131.

171. *Id.*

1) voluntary execution of a written surrender of the child; 2) the inability to identify or ascertain the location of a parent by diligent search; 3) egregious conduct by the parent that endangers the life, health, or safety of the child or the child's sibling; or 4) when the child has been adjudicated dependent, a case plan has been filed with the court, and the child continues to be abused, neglected, or abandoned by the parent.¹⁷²

In a September 1994 opinion, the Supreme Court of Florida in *re T.M.*,¹⁷³ was presented with the question of whether a termination of parental rights case could go forward in a situation where there had been no provision for a performance agreement or permanent placement plan with the parent prior to the termination. Under the 1990 version of the termination statute, a performance agreement or permanent placement plan need not have been made available under section 39.464 in the situation of severe or continuing abuse or neglect and egregious abuse.¹⁷⁴ In *T.M.*, the father, whose parental rights had been terminated in the lower court, argued on appeal that sections 39.464(3) and (4) conflicted with section 39.467, which articulated the procedure for an adjudicatory hearing in termination of parental rights cases.¹⁷⁵ Section 39.467 required proof that either a performance agreement or permanent placement plan had been offered to the parent or that any of the elements of section 39.464 were met, and that the parent offered the agreement or plan has failed to substantially comply with it.¹⁷⁶ The Supreme Court of Florida held that the two sections of the law were not inconsistent.¹⁷⁷ Section 39.467 should be read in the disjunctive, and, therefore, termination could take place and be satisfied without offering a performance agreement.¹⁷⁸

The appellant father also argued that termination of parental rights without a plan or an agreement violated his constitutional right to family integrity as articulated by the supreme court in *Padgett v. Department of Health & Rehabilitative Services*.¹⁷⁹ The supreme court held that performance agreements or permanent placement plans are not required in all

172. FLA. STAT. § 39.464.

173. 641 So. 2d 410 (Fla. 1994).

174. FLA. STAT. § 39.464(3)-(4) (1990).

175. *T.M.*, 641 So. 2d at 411.

176. *Id.*

177. *Id.* at 412.

178. *Id.*

179. *Id.* (citing *Padgett v. Department of Health & Rehabilitative Servs.*, 577 So. 2d 565, 571 (Fla. 1991)); *see also 1991 Survey*, *supra* note 1, at 368-73.

instances and that the *Padgett* court used the term “ordinarily” to indicate that there might be exceptions.¹⁸⁰ This case is one of them.

As the listing above shows, one of the grounds for termination of parental rights is a voluntarily executed written surrender of the child, giving the youngster to HRS or to a licensed child-placing agency for subsequent adoption.¹⁸¹ In any termination situation, there must be proof that the termination is in the manifest best interests of the child and that certain notice requirements have been met.¹⁸² In *Henriquez v. Adoption Centre, Inc.*,¹⁸³ the Fifth District Court of Appeal was asked to revisit the issue of the grounds for revocation of the voluntary surrender. The case concerned a mother’s appeal from a trial court decision terminating her parental rights when she voluntarily surrendered her nine-month old child to the adoption center, but when five days after doing so, she withdrew her waiver and consent and sought to have her child returned. The mother claimed at trial that termination was improper because the Florida statute governing termination was unconstitutional. She argued that it did not provide for a cooling-off period for parents who voluntarily execute a written surrender of the child. The mother argued further that she had surrendered her child under duress. On motion for rehearing *en banc*, the Fifth District Court of Appeal held that the supreme court previously upheld the constitutionality of the statute on due process and equal protection grounds in *re Adoption of Doe*.¹⁸⁴ The court held that the failure to provide a cooling-off period can only be remedied by the legislature.¹⁸⁵ The court also held that clear and convincing evidence showed that the surrender had been freely and voluntarily executed.¹⁸⁶

In a lengthy dissent, Chief Judge Harris argued that there was no finding that termination was in the best interests of the child pursuant to the then applicable statute.¹⁸⁷ Chief Judge Harris’s second argument was that *In re Adoption of Doe* did not consider a constitutional challenge to the

180. *T.M.*, 641 So. 2d at 413.

181. FLA. STAT. § 39.464(1)(a) (Supp. 1994).

182. *Id.* §§ 39.4611(1)(c), 39.462.

183. 641 So. 2d 84 (Fla. 5th Dist. Ct. App. 1993), *review denied*, 649 So. 2d 233 (Fla. 1994).

184. *Id.* at 89 (citing *In re Adoption of Doe*, 543 So. 2d 741 (Fla. 1989), *cert. denied*, 493 U.S. 964 (1989)).

185. *Id.* at 89-90.

186. *Id.* at 90.

187. *Id.* at 96 (Harris, C.J., dissenting); see FLA. STAT. § 39.467 (1991). See also *id.* §§ 39.4611-39.4612 (Supp. 1994) (reflecting the necessity of considering the manifest best interests of the child in termination of parental rights cases).

consent provision based upon the mother's fundamental liberty interest in the care, custody, and management of her child.¹⁸⁸ The chief judge argued that the state should not be allowed to terminate parental rights "by barring parents from changing their minds (even after a waiver and consent is properly executed) when the change of mind occurs *before the petition for termination is even filed* and before the rights of any potential adoptive parents come into existence[.]"¹⁸⁹ In his view, the statute ensures quick and efficient resolution and disposal of such cases, but denying the mother the right to make a case that she is a fit and deserving mother who is able and willing to continue to care for the child "is both unfair and unreasonable."¹⁹⁰

The question of who has standing to bring a termination of parental rights proceeding has been before the Florida appellate courts on a number of occasions.¹⁹¹ Whether allowing a guardian ad litem to petition for termination of parental rights violates the separation of powers clause of the *Florida Constitution* was an issue considered by the Third District Court of Appeal recently in *Simms v. State*.¹⁹² The court held in an *en banc* decision that there was no violation of the separation of powers doctrine.¹⁹³ The court ruled that the power to protect the welfare of children and terminate parental rights was not an exclusive power of one branch of government and, therefore, not subject to the separation of powers clause.¹⁹⁴ The court found that there was power to protect children both in the executive and in the judicial branch. The authority of the courts to protect children was inherent and, according to the appellate court, extended to the appointment of guardians ad litem for unrepresented children.¹⁹⁵ This authority was codified by the Florida Legislature in 1975.¹⁹⁶ At the same time, the legislature created HRS and charged it with the protection of dependent children.¹⁹⁷ Thus, the court could find no language in the *Florida Constitution* nor historical precedent confining the power to a single

188. *Henriquez*, 641 So. 2d at 98-99 (Harris, C.J., dissenting).

189. *Id.* at 99.

190. *Id.* at 101.

191. See 1993 *Leading Cases*, *supra* note 1, at 544-46; 1990 *Survey*, *supra* note 1, at 1201.

192. 641 So. 2d 957 (Fla. 3d Dist. Ct. App. 1994), *review denied*, 649 So. 2d 870 (Fla. 1994).

193. *Id.* at 962.

194. *Id.* at 961.

195. *Id.*

196. *Id.* (citing FLA. STAT. § 415.508 (1991)).

197. *Simms*, 641 So. 2d at 961.

branch of government. Rather, it found that section 39.464 provides concurrent authority in HRS, guardians ad litem, and licensed child-placing agencies to file petitions to terminate parental rights.¹⁹⁸ Finally, the court concluded that there are situations where the best interests of the child and HRS's interests may differ.¹⁹⁹ Therefore, providing authority in both branches of government furthers the State's interest in protecting children.²⁰⁰

Chief Judge Schwartz dissented, arguing that it was a violation of due process, in the context of the right to a fair trial, to permit the judiciary's appointee, in the form of a guardian ad litem, to prosecute an action to deprive a parent of the precious right to her child.²⁰¹ In his view, it is "profoundly wrong for any entity but the executive to seek and advocate the deprivation of another's rights."²⁰² Chief Judge Schwartz also noted that the problem may have been rectified in 1994 by the legislature's change in section 61.403,²⁰³ which now provides that "[a] guardian ad litem when appointed shall act as next friend of the child, investigator or evaluator, *not as attorney or advocate* but shall act in the child's best interest."²⁰⁴

However, section 61.403 also provides that the guardian ad litem, acting through counsel, may file pleadings for relief as the guardian deems appropriate in furtherance of the guardian's function.²⁰⁵ Thus, whether the guardian ad litem either individually or through counsel can file petitions to terminate parental rights remains open to interpretation. If Chief Judge Schwartz is correct, the child is left at the mercy of HRS to protect his or her interests for filing purposes. An alternative approach, which Florida has never followed, is to provide the right to counsel for a child in a dependency proceeding which would then allow for protection at the termination stage.²⁰⁶

Termination of the parental rights of parents who are in prison is a common issue both in the appellate courts of Florida²⁰⁷ and throughout the

198. *Id.*

199. *Id.* at 962.

200. *Id.*

201. *Id.* at 963 (Schwartz, C.J., dissenting).

202. *Simms*, 641 So. 2d at 963 (Schwartz, C.J., dissenting).

203. *Id.* at 963 n.1.

204. FLA. STAT. § 61.403 (emphasis added).

205. *Id.* § 61.403(6).

206. See *Juvenile Law*, *supra* note 1, at 888; see also MARK I. SOLER ET AL., REPRESENTING THE CHILD CLIENT 4-52 to 4-55 (Matthew Bender, 1994).

207. See, e.g., *In re E.F.*, 639 So. 2d 639 (Fla. 2d Dist. Ct. App. 1994); *In re C.M.*, 632 So. 2d 1093 (Fla. 1st Dist. Ct. App. 1994).

country.²⁰⁸ In *re G.R.S.*,²⁰⁹ a natural father appealed from an order terminating parental rights for abandonment and failure to comply with a performance agreement. The father had consented to dependency of the child and entered into a performance agreement with the goal of reunification.²¹⁰ At the time, the father was in prison. The agreement obligated him to comply with rules of the prison, participate in drug programs and parenting classes, obtain adequate housing upon release, obtain a psychological evaluation and, if necessary, therapy, and maintain biweekly contact with HRS.²¹¹ The appellate court overturned the trial court's fact-finding, concluding that "[t]he record reflect[ed] that [the father] substantially performed all of the tasks that were offered in prison, but could not perform certain tasks because they were not available to him."²¹² Furthermore, the trial record was "devoid of any evidence of reasonable efforts by HRS to reunify the family, communicate with the father or offer the father meaningful assistance in completing any of the tasks required by the performance agreement."²¹³ In fact, it was unrefuted that the father's correspondence to HRS about his son and the case went unanswered.²¹⁴ The court also rejected a claim of abandonment as grounds for termination, finding that the relationship between the father and the natural grandparents with whom the child resided "was strained at best."²¹⁵ The father wrote to the child and only stopped correspondence because he received no return correspondence from the grandparents. Additionally, they would not accept his collect calls. The order of termination was reversed and the case was remanded to provide time to the father to substantially comply with the performance agreement.²¹⁶

D. Government Agency Tort Liability

In a significant decision rendered in the summer of 1995, the Supreme Court of Florida was asked to decide the question of whether an adjudicated dependent juvenile may maintain an ordinary negligence claim against HRS for the latter's alleged failure to provide the juvenile with services. In

208. SOLER, *supra* note 206, at 4-118.

209. 647 So. 2d 1025 (Fla. 4th Dist. Ct. App. 1994).

210. *Id.* at 1026.

211. *Id.* at 1026-27.

212. *Id.* at 1027.

213. *Id.*

214. *G.R.S.*, 647 So. 2d at 1027.

215. *Id.*

216. *Id.* at 1028.

Department of Health and Rehabilitative Services v. B.J.M.,²¹⁷ the Supreme Court of Florida, in an opinion by Justice Anstead, answered the certified question in the negative. The case began when an adjudicated dependent and delinquent minor, through its guardian ad litem, Legal Services of Greater Miami, filed a mandamus action against HRS seeking to compel the agency to place the child in a specific rehabilitative program. Subsequently, the child amended his complaint to include a tort claim for general damages based on negligence. Specifically, the child claimed that HRS breached its duty to the child by not following recommended psychiatric placement reports, failing to provide proper counsel, failing to provide vocational training or educational services comparable to those provided in non-residential settings, failing to generally meet the child's emotional, developmental and placement needs, and by inappropriately labeling the child. In response, HRS moved for summary judgment. The trial court granted the motion. The Third District Court of Appeal reversed and certified the question to the supreme court.²¹⁸

After disposing of several procedural issues, including collateral estoppel, the supreme court addressed the question of sovereign immunity.²¹⁹ The court surveyed the historical analysis of sovereign immunity by the Florida courts. It held that the parameters of governmental tort liability are premised upon finding governmental activity in one of four categories: 1) legislative, permitting, licensing and executive officer functions; 2) enforcement of laws and the protection of public safety; 3) capital improvement and property control operations; and 4) professional, educational, and general services for the health and welfare of the citizens.²²⁰ The court explained that assuming a government action or function is not protected under the first two categories, the court must determine whether conduct within categories three or four amounts to a "discretionary planning or judgmental function" as opposed to conduct which is purely operational.²²¹ If the challenged action is policy making, planning, or judgmental activity, it is immune from tort liability. In other words, the question is whether the function is policy making, planning, or judgmental as opposed to routine operational level actions that are subject to tort liability. The court cited *Department of Health and Rehabilitative Services v. Whaley*²²²

217. 656 So. 2d 906 (Fla. 1995).

218. *Id.* at 909.

219. *Id.*

220. *Id.* at 911.

221. *Id.* at 912.

222. 574 So. 2d 100 (Fla. 1991).

for the proposition that operational level decisions expose a child to a specific danger, such as physical placement of a child in a specific room in an HRS detention center known to HRS to be occupied by dangerous juveniles.²²³ The court also cited *Department of Health and Rehabilitative Services v. Yamuni*,²²⁴ to address the danger of negligently failing to adequately protect the child from further physical abuse at the operational level.²²⁵ Relying upon cases rejecting theories of educational neglect, the court held that both placement decisions and decisions as to the provisions of services are planning level activities and not operational ones.²²⁶ Thus, the court concluded that decisions on how to properly plan for a dependent child or rehabilitate a delinquent juvenile and to assess the need for counseling, education, and vocational training are discretionary judgmental decisions to be made pursuant to the broad discretion vested in HRS by the legislature.²²⁷ For these actions HRS is immune.

Finally, the court held that its conclusion that the failure to provide certain services to the child was shielded by sovereign immunity, was also supported by *Florida Statutes* § 39.455.²²⁸ That statute immunizes social workers who are carrying out a placement plan for dependent children. The court noted that the law does create a duty on the part of HRS and its agents and employees not to act with wanton or willful disregard of the interest of the child. Thus, a claim based on willful and wanton conduct is actionable.²²⁹ *B.J.M.* therefore holds that immunity protects HRS from tort liability for judgmental decisions relating to the care of dependent and delinquent children. HRS may only be sued for operational level acts of negligence.

E. Legislation

This year the legislature expanded HRS's duty to report certain findings to law enforcement during child abuse and neglect investigations, including when HRS is aware that the family is likely to flee and when the immediate safety or welfare of the child is in danger.²³⁰ HRS must now make an

223. *B.J.M.*, 656 So. 2d at 913 (citing *Whaley*, 574 So. 2d at 101).

224. 529 So. 2d 258 (Fla. 1988).

225. *B.J.M.*, 656 So. 2d at 913 (citing *Yamuni*, 529 So. 2d at 260).

226. *Id.*

227. *Id.* at 916.

228. *Id.* at 917.

229. *Id.*

230. See ch. 95-228, § 3, 1995 Fla. Sess. Law Serv. 1556, 1560 (West) (to be codified at FLA. STAT. § 415.505).

immediate report to law enforcement agencies, whereas previously, the agency had up to three days before transmitting the report to law enforcement.²³¹ Also, the law which mandated certain persons with defined legal duties to report abuse or neglect to HRS now extends to reporting an abandoned child.²³²

Previously, HRS could only take away an alleged dependant child upon reasonable grounds that the child was abused, neglected, abandoned, suffering from an injury, or in immediate danger.²³³ The legislature has eased this burden. Now, HRS can justify taking an alleged dependant child merely upon probable cause to support a finding of reasonable grounds for the child's removal.²³⁴ Further, the grounds for child removal now include a lack of immediate adult supervision or care, in addition to the situation where the child's custodian materially violates a condition of court imposed placement (if the child was court placed).²³⁵ Once the child is taken into custody by HRS, an emergency shelter hearing must take place within twenty-four hours of the child's removal.²³⁶ During the pendency of that hearing, relatives of the child will have priority consideration over custody of the child as opposed to nonrelative placement.²³⁷

In adjudicatory hearings, the court must now possess independent corroborative evidence of the dependency when the proceeding is based solely on an anonymous report.²³⁸ In the past, courts, on the basis of stare decisis, protected indigent parents or guardians of the child by requiring counsel for them during a dependency action when the dependency could form the basis for a subsequent termination of parental rights.²³⁹ Florida law has been amended to comply with the prior case law and mandates that indigent parents be appointed counsel in dependency actions when threa-

231. *Id.*

232. *See id.* § 44, 1995 Fla. Sess. Law Serv. at 1611-12 (amending FLA. STAT. § 415.504).

233. *See* FLA. STAT. § 39.401.

234. Ch. 95-228, § 6, 1995 Fla. Sess. Law Serv. at 1561-62 (amending FLA. STAT. § 39.401(1), (6)); *see also id.* § 7, 1995 Fla. Sess. Law Serv. at 1562-64 (to be codified at FLA. STAT. § 39.402).

235. *Id.* § 6, 1995 Fla. Sess. Law Serv. at 1561-62 (to be codified at FLA. STAT. § 39.401(b) (1993)).

236. *Id.*

237. *Id.*

238. Ch. 95-228, § 12, 1995 Fla. Sess. Law Serv. at 1568 (to be codified at FLA. STAT. § 39.408).

239. *In re D.B.*, 385 So. 2d 83 (Fla. 1980); *In re D.F.*, 622 So. 2d 1102 (Fla. 1st Dist. Ct. App. 1993); FLA. R. JUV. P. 8.320.

tened with permanent loss of the child or when criminal charges underlie the dependency petition.²⁴⁰

The legislature has expressed its intent to encourage relatives to care for a child who is taken into foster care custody.²⁴¹ Further, the legislature expressed its preference that adoptive placements take place as expeditiously as possible after a termination of parental rights in order to avoid temporary placements.²⁴² Long-term foster care placements are not generally considered a permanent option, but may be considered a permanent option when all the following conditions are met: the child is fourteen years or older; the child lives in a licensed foster home and the foster parents and child desire to live together on a permanent basis but do not wish to adopt; the foster parents are committed to providing care to the child until age of majority; the child has lived with foster parents for at least twelve months; the foster parents and child view each other as family; and the child's well-being is being promoted by the living arrangements.²⁴³ Long-term placements, however, are not permanent, and are subject to court revocation when a material change in circumstances exists, which makes it no longer in the child's best interest to remain in the particular foster home.²⁴⁴

IV. FAMILIES IN NEED OF SERVICES AND CHILDREN IN NEED OF SERVICES

As prior surveys have indicated, there is very little case law interpreting the part of the 1987 juvenile code covering families and children in need of services.²⁴⁵ However, one aspect of the Families in Need of Services and Children in Need of Services ("FINS/CINS") statute that has generated discussion is the proposition that a child who violates a CINS order may be held in contempt of court and then have his or her liberty removed by placement in secure detention.²⁴⁶ The ability of the court to punish a

240. Ch. 95-228, § 5, 1995 Fla. Sess. Law Serv. at 1561 (amending FLA. STAT. § 39.40 (1993)).

241. *See id.* § 13, 1995 Fla. Sess. Law Serv. at 1568-69 (amending FLA. STAT. § 39.45 (Supp. 1994)).

242. *Id.* § 14, 1995 Fla. Sess. Law Serv. at 1569 (amending FLA. STAT. § 39.47 (Supp. 1994)).

243. *Id.* § 62, 1995 Fla. Sess. Law Serv. at 1635 (to be codified at FLA. STAT. § 39.41(2)(a)6.c.(I)-(V)).

244. *Id.* § 62, 1995 Fla. Sess. Law Serv. at 1635 (to be codified at FLA. STAT. § 39.41(2)(a)6.d.).

245. *See 1992 Survey, supra* note 1, at 383-84.

246. FLA. STAT. § 39.444 (Supp. 1994).

status offender by use of secure detention is not just an issue in Florida. The Federal Juvenile Justice and Delinquency Prevention Act also provides for the enforcement of valid court orders in status offender cases by contempt and punishment and ultimately incarceration.²⁴⁷

Indeed, the issue of punishment of children for violation of CINS orders was recently before the Fifth District Court of Appeal in *Department of Juvenile Justice v. S.W.*²⁴⁸ The Department of Juvenile Justice filed a petition for certiorari on behalf of two children who had been adjudicated children in need of supervision and who were ordered by the trial court to complete certain educational requirements, although the appellate court noted that the record was quite unclear on exactly what was ordered.²⁴⁹ Four months after the initial order, the trial court issued an "Order to Show Just Cause" to the two children to show why they should not be held in indirect criminal contempt for failure to comply with the court's school orders.²⁵⁰ The children appeared, waived counsel, and pled guilty to contempt of court. They were adjudicated delinquent, placed in non-secure detention and, after a disposition hearing, placed at restrictiveness level two, and ordered to pay costs, restitution, and comply with other special provisions.²⁵¹ All of this was done in clear contravention of the Supreme Court of Florida's 1992 opinion in *A.A. v. Rolle*,²⁵² which held that the court may not adjudicate children delinquent and in contempt for violation of the CINS order and place them in detention as punishment. The *S.W.* court recognized this and granted the petition for certiorari.²⁵³ In fact, current Florida law now provides for the secure detention for direct or indirect criminal contempt for violation of the CINS order.²⁵⁴ The legislature responded to the *A.A.* decision by amending the juvenile code to allow for secure detention of CINS for five to fifteen days in a staff secure shelter or residential facility.²⁵⁵

Some minor statutory changes were made by the legislature concerning status offenses. Students expelled from school are not guaranteed continu-

247. 42 U.S.C. §§ 5601-5785 (1988 & Supp. V 1993).

248. 647 So. 2d 1055 (Fla. 5th Dist. Ct. App. 1994).

249. *Id.* at 1056 n.1.

250. *Id.* at 1056.

251. *Id.*

252. 604 So. 2d 813 (Fla. 1992).

253. *S.W.*, 647 So. 2d at 1056.

254. See FLA. STAT. § 39.0145 (1993).

255. *Id.* § 39.0145(2)(b).

ing educational services.²⁵⁶ Nonetheless, district school systems may set up alternative site schools for disruptive or violent youths.²⁵⁷ The alternative site schools are generally referred to as second chance schools.²⁵⁸ Students assigned to second chance schools must either be: habitually disruptive, interfere with their own or other's learning, or commit a serious offense which would normally warrant suspension or expulsion.²⁵⁹ If one of these criteria exists, the school's local child study team will evaluate the child to determine if placement into the second chance school is necessary.²⁶⁰ The school boards should take into account the student's safety, the school's ability to control the student, the appropriate educational program in which to place the student, and how to maintain an educational learning environment.²⁶¹

V. CONCLUSION

The legislature had taken a hiatus from its prior efforts to respond to public pressure involving the juvenile justice and child welfare systems. The appellate courts have been diligent in hearing significant trial issues and holding the trial courts accountable for compliance with the juvenile code. It would be desirable for the legislature to allow the current juvenile code to remain in effect so that all participants in the juvenile justice and child welfare system have an opportunity to familiarize themselves with the law and employ it over time. It is hard to evaluate the effectiveness of the juvenile code when the legislature changes it in response to every change in the political wind.

256. Ch. 95-267, § 63, 1995 Fla. Sess. Law Serv. at 1877 (amending FLA. STAT. § 228.041 (Supp. 1994)).

257. *See id.* § 64, 1995 Fla. Sess. Law Serv. at 1877-78 (amending FLA. STAT. § 230.02 (1993)).

258. *See id.* § 67, 1995 Fla. Sess. Law Serv. at 1880-81 (to be codified at FLA. STAT. § 230.2316).

259. *Id.*

260. *Id.*

261. *See* ch. 95-267, § 65, 1995 Fla. Sess. Law Serv. at 1878 (to be codified at FLA. STAT. § 230.22).